UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JERRY ADKINS, et. al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CAUSE NO. 3:09-CV-00510
	)	
KENNETH R. WILL, VIM RECYCLING, INC., and K.C. INDUSTRIES, LLC.	)	
	)	
Defendants.	)	

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, JERRY ADKINS, et. al., by counsel, Kim Ferraro with the Legal Environmental Aid Foundation of Indiana, Inc., respectfully request a preliminary injunction pursuant to Federal Rule of Civil Procedure 65, to enjoin Defendants, VIM RECYCLING, INC. ("VIM"), K.C. INDUSTRIES, LLC, ("K.C. Industries") and KENNETH R. WILL ("Kenneth Will"), from processing solid waste and disposing of any additional solid waste at Defendants' facility located at 29861 U.S. 33, in Elkhart, Indiana ("VIM facility" or "VIM site"). Plaintiffs request this injunction until the Court has had an opportunity to rule on Plaintiffs' claims brought under the Resource Conservation and Recovery Act ("RCRA" or "Act"), 42 U.S.C. § 9601, *et. seq.,* Indiana statutes and regulations that implement RCRA, and state tort law.

INTRODUCTION

Plaintiffs allege that Defendants have transported, handled, stored, processed and disposed of thousands of tons of engineered wood wastes, construction and demolition wastes, and other solid wastes at the VIM site in violation of RCRA and Indiana's implementing solid waste management laws for the last nine (9) years and continue to do so. Regulated solid wastes

dumped at the VIM site include: "B" waste comprised of "manufactured" wood such as plywood, particle board, oriented strand board (OSB), luan and other "engineered" woods which contain chemical binders, glues and resins; and, "C" waste which includes "B" wood waste that has been stored longer than six (6) months, wastes from RV manufacturing and construction sites including scrap lumber, wallboard/drywall, gypsum, roofing materials, vinyl, plastic, carpet, glass, insulation and other building/structure materials.[1] Old tires, metal objects, animal bones, wastewater treatment plant sludge, and other wastes have also been discarded at the VIM site.[2]

Since beginning operations at the VIM site in 2000, Defendants have never applied for nor obtained a permit to process and/or dispose of solid waste at the VIM site from the Indiana Department of Environmental Management ("IDEM") as required by Indiana's solid waste management laws that implement RCRA. Nevertheless, Defendants have processed and disposed of these harmful wastes at the VIM site on bare earth, without the use of any barrier, lining, or containment system allowing contaminants to leach into the ground, attracting harmful vectors, and posing a fire and safety hazard to the surrounding neighborhood where Plaintiffs reside and work. When the massive waste piles are unearthed and shifted, dangerous emissions and noxious odors from the decomposing and smoldering wastes have been and are released into the atmosphere. When the wastes are ground and processed toxic fugitive dust is released. Indeed, in August of 2005, IDEM determined, among other things, that Defendants' improper disposal of solid waste constitutes "a threat to human health or the environment, including the creating of a

[1] **Plaintiffs' Exhibit A**: Email of Rick Roudebush, IDEM, to Paul Ruesch, EPA Region V, Subject: "VIM Waste Definitions" (Jun. 15, 2009).
[2] *See generally* photographs attached to various IDEM Site Inspection Reports attached hereto.

fire hazard, vector attraction, air or water pollution, or other contamination," and constitutes an "open dump.[3]"

Since that time, IDEM officials have informed Defendants on multiple occasions, in writing, that it is illegal to process and dispose of "B" and "C" wastes at the VIM site. Nonetheless, Defendant Ken Will continues to knowingly, intentionally, and willfully bring "B" waste to the site and open dump the waste with utter disregard for the law, health and safety of others, and the environment.[4]

Plaintiffs are entitled to a preliminary injunction because they have been, and will continue to be, irreparably harmed if Defendants are allowed to continue open dumping and processing solid wastes at the VIM site in violation of RCRA and Indiana's solid waste management laws. Defendants will not be harmed if they are enjoined from continuing their blatantly illegal and unauthorized solid waste activities because they have no right to engage in those activities. Plaintiffs have a significant probability of success on the merits in this lawsuit because the evidence vividly illustrates that Defendants are engaged in solid waste activities that violate RCRA requirements, have caused irreparable harm, and threaten continued irreparable harm to Plaintiffs' health and environment. Injunctive relief consequently will benefit the public interest because Defendants will be enjoined from their continued violation of RCRA mandates that were enacted expressly to protect the public interest.

I. FACTUAL BACKGROUND

In November of 1999, IDEM ordered Defendants, Kenneth Will and VIM, to close outdoor grinding operations at Defendants' site located at 64654 US 33, in Goshen, Indiana

[3] **Plaintiffs' Exhibit B:** IDEM Inspection Summary/Referral Letter (Aug. 31, 2005) with attached reports of multi-media inspection Aug. 2, 2005.
[4] **Plaintiffs' Exhibit C:** IDEM Violation-Referral to Enforcement Letter (Dec. 21, 2009) with attached Report of Open Dump Inspection of 12-8, 15 and 16, 2009 and photographs.

("Goshen site"). IDEM further ordered Defendants to remove certain outdoor waste piles from the Goshen site, and pay civil penalties in the amount of $85,000 due to Defendants' failure to control fugitive dust, and complaints from the surrounding community for many years of uncontrolled dust, odors, fires and other hazardous conditions.[5] Sometime prior to July, 2000, Defendants began the same outdoor grinding operations at the VIM site in Elkhart that Defendants had been ordered to cease at the Goshen site.[6]

On June 4, 2004, Gordorn Lord, then attorney for the Elkhart County Solid Waste Management District Board sent a letter to Defendant, Kenneth Will, informing Defendant Will that the District Board had received "numerous complaints" about the VIM site in Elkhart and "its ever-growing piles of outside storage and perpetual creation of dust and film negatively impact[ing] property owners in a wide area near [the] site.[7] Further, Mr. Lord noted that Defendants' operations at the VIM site were "arguably doing far more harm to adjoining properties and the environment generally than any positive impact [Defendants'] recycling programs may have.[8]"

On August 2, 2005, IDEM conducted a multi-media inspection of the VIM Site in part because, "neighbors continue[d] to complain to IDEM and Elkhart County about dust, odor, rodents, potential fire hazards and aesthetic issues associated with the large raw material storage piles.[9]" During the inspection, IDEM determined, among other things, that Defendants' outdoor storage of "C waste" constitutes "disposal of solid waste," "a threat to human health or the environment, including the creating of a fire hazard, vector attraction, air or water pollution, or

[5] **Plaintiffs' Exhibit D:** IDEM Agreed Order No. A4140(b) (Nov. 16, 1999) with attached letter from Shirley Van Gilst (May 3, 1999) and letters from Randy Martin, ISES, to Brian Eaton, IDEM of 4/15/99, 4/28/99 and 9/16/99.
[6] *Id.*
[7] **Plaintiffs' Exhibit E:** Gordon Lord letter to Ken Will (June 4, 2004).
[8] *Id.*
[9] *See* **Plaintiffs' Exhibit B,** *supra.*

other contamination," and constitutes an "open dump.[10]" IDEM calculated the total volume of the "C" waste to be approximately 107,780 cubic yards, an amount far greater than Defendants had "removed in the last five (5) years or would be expected to remove in the next five, constituting a violation of the solid waste storage regulations." IDEM notified Defendant, Kenneth Will, that he was to "immediately cease storing/disposing any additional 'C grade' material at the Site.[11]"

In a follow up inspection on January 25, 2006, IDEM found that Defendants had failed to address and/or remedy any of the solid waste violations found at VIM Site during the August 2, 2005 inspection. At that time, IDEM calculated the total volume of the C grade waste pile to be approximately 149,645 cubic yards – a near fifty percent (50%) increase since the prior calculation performed only five (5) months earlier - even though IDEM had instructed Defendant, Kenneth Will, to immediately cease storing/disposing any additional 'C grade' material at the Site.[12]

On January 16, 2007, IDEM and Defendants entered into Agreed Order 2006-15827-S ("AO") under which Defendants agreed to "remove and properly dispose" of all "C grade waste" then existing at the VIM site by September 30, 2008.[13] Under the AO, Defendants were also ordered to "immediately cease:" taking any "C grade" solid waste to any site other than a permitted solid waste management facility; placing any additional material on the existing "C grade" solid waste piles; composting/processing City of Elkhart bio-solids with processed "C grade" solid waste and gypsum; and using any regulated solid waste to construct the on-site berms.[14]

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[10] *Id.*
[11] *Id.*
[12] **Plaintiffs' Exhibit F:** IDEM Agreed Order No: 2006-15827-S (Jan. 16, 2007).
[13] *Id.*.
[14] *Id.*

On June 14, 2007, there was a catastrophic fire at the VIM Site that killed an undocumented VIM worker, seriously injured another, took 25-30 fire departments over four days to extinguish, and reduced much of the outdoor waste piles to charred and smoldering debris.[15] The subsequent OSHA investigation revealed that the fire was due to an excessive build up of "explosive dust" created during the grinding process, Defendants putting grinders in hazardous locations, and other "serious" safety violations that sparked a series of explosions inside the plant, and ignited the mountainous waste piles outside.[16] The Baugo Township Fire Department responded to at least twelve (12) fires at the VIM site, prior to the June 2007 fire and at least nine (9) fires since then, due to "material decomposition," "mulch pile fires," and "large wood pile fires.[17]"

IDEM inspected the VIM site several times in July and August of 2007 and noted that "VIM has attracted neighborhood complaints of odor, noise, and fugitive dust for a number of years." IDEM found that Defendants were grinding "B waste" outdoors which was not permitted.[18]

On August 21, 2007, IDEM personnel held an internal meeting and identified the following issues concerning the VIM site:

> The 'B' material stockpiled at the VIM facility is a concern due to the size of the pile and the potential storage time in excess of 6 months . . . Scott Nally came to an agreement with Ken Will that VIM would not bring in any more 'B' material at the site.
>
> The solid waste berm at the VIM site is unstable and will need to be tested for engineering and environmental suitability.

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[15] **Plaintiffs' Exhibit G:** Office of the Fire Marshall, Report of Fire Investigation and Supplemental Reports (Aug. 8, 2007).
[16] **Plaintiffs' Exhibit H:** Indiana Dept. of Labor, IOSHA, Safety Order and Notification of Penalty (Sept. 5, 2007).
[17] **Plaintiffs' Exhibit I:** VIM Public Safety History, Elkhart Township Fire Dept
[18] **Plaintiffs' Exhibit J:** IDEM, Office of Air Quality Field Inspection Report (Aug. 10, 2007).

> The 'C' material is deemed immediately harmful due to the ongoing fire hazards and presence of 'hot spots'.[19]

From July 2, 2008 through November 5, 2008, IDEM made weekly inspections to the VIM site to monitor Defendants' compliance with removal of the "C" waste as required by IDEM's AO of January 2007.[20] Notably, IDEM inspectors reported that "the covered burnt C pile" was still "hot," "smoldering, and emitting "smoke" more than a year after the fire and that IDEM's Northern Regional Office had "received phone calls of bad odor coming from the site.[21]" Documenting Defendants' lack of compliance with IDEM's AO, the IDEM inspector reported on each weekly visit that Defendants had not taken any C waste to the landfill for proper disposal and Defendants were grinding and mixing C waste with additional gypsum.[22] Consequently, on December 22, 2008, IDEM sent a letter to Defendant, Ken Will stating:

> Item number nine of the Agreed Order says 'Respondent shall remove and properly dispose of the C grade solid waste at the Site [by September 30, 2008] . . . All Field Surveillance Reports note that nothing has been taken to the landfill for proper disposal and no landfill receipts were available to document disposal. VIM Recycling is in violation of Item number nine of [the AO].[23]

Confirming the consternation of state and local agency staff with Defendant Ken Will's deliberate noncompliance with environmental regulations and zoning requirements, the Director of IDEM's Northern Regional Office, Michael Aylesworth stated in an email to Bob Watkins, Elkhart County Plan Director that:

> Both of us know Ken's tendency to not take the rules seriously, especially the timelines. This attitude gives both of us heartburn as I also have little patience for

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[19] **Plaintiffs' Exhibit K:** Email exchange between numerous IDEM personnel, Subject: "Pile C Uses VIM Recycling, Inc.," (Aug. 21, 2007 and Aug. 30, 2007).
[20] **Plaintiffs' Group Exhibit L:** IDEM Field Surveillance Reports of 7/2/08, 9/15/08, 9/22/08, 9/29/08, 10/9/08, 11/5/08 and Inspection Summary/Violation Letter of 12/22/08.
[21] **Plaintiffs' Group Exhibit L,** *supra.*
[22] *Id.*
[23] *Id.*

> scofflaws. Ken Will is running the risk of endangering any good will he has left in the government oversight community.[24]

On October 13, 2008, IDEM performed a site inspection to evaluate Defendants' compliance with the January 2007 AO at the request of IDEM's Office of Enforcement and the Indiana Attorney General.[25] The inspection summary reports Defendants failed to comply with five provisions of the AO including failure to remove and properly dispose of the C waste pile. In addition, during the inspection IDEM noted:

> A large crane was on top of the buried 'C' pile waste, excavating the wastes from the upper portion of the pile. While the crane was unearthing the 'C' grade waste and also while the wastes were being shifted (shaken), *the waste was observed emitting a lot of smoke, from internal combustion within the pile*.[26]

On December 17, 2008, IDEM sent a letter to Defendant, Kenneth Will, "clarify[ing] the regulatory status of activities at the VIM [Site], relative only to the state's solid waste regulations" as follows:

> Three different waste materials exist at the facility. "A" waste which consist of trees, brush, recently live wood and uncontaminated lumber, which is ground up and used as mulch; "B" Waste which is a mixture of wood scraps containing laminated wood and plywood collected from various manufacturers in the area that is ground up to make animal bedding; and "C" waste which is "B" Waste that is no longer suitable for use in making animal bedding, and which was proposed for use under a Marketing and Distribution permit.
>
> As has been relayed to you in previous meetings with IDEM staff, processing of "B" Waste does require the issuance of a Solid Waste Processing Permit under 329 IAC 11. To date, the Office of Land Quality has not received an application for a Solid Waste Processing Permit for your facility. It is expected that you will cease and desist from grinding "B" Waste at your facility until the appropriate permit is obtained. If the processed "B" Waste is going to be utilized as animal bedding you must also obtain a beneficial use approval from IDEM under 329 11-3-1(15).

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[24] **Plaintiffs' Exhibit M:** Email of Michael Aylesworth, IDEM to Bob Watkins, Elkhart County (Apr. 15, 2008).
[25] **Plaintiffs' Exhibit N:** IDEM Inspection Summary Letter of Nov. 13, 2008 with attached IDEM Office Memorandum of Oct. 13, 2008 and photographs.
[26] *Id.* (emphasis added).

> Grinding and processing of "C" Waste was going to be addressed under the Marketing and Distribution for which you applied. Given that permit has been denied any grinding or processing of "C" Waste will also require the issuance of a Solid Waste Processing Permit. It is expected that you will cease and desist from grinding "C" Waste at your facility until the appropriate permit is obtained.[27]

On January 6, 21-22, 2009, IDEM performed inspections of Defendants' Goshen site, the newly discovered Warsaw site, and the Elkhart VIM Site.[28] As to the VIM site, IDEM determined that Defendants had "allowed 'C' pile wastes to remain open dumped on the property; placed 'C' pile waste (fines) on top of the berm along the north side of the facility without written approval from IDEM; had not submitted a sampling and analysis plan to IDEM for approval or demonstrated that the berm is physically and chemically stable and able to support vegetative cover; failed to remove all remaining 'C grade' solid wastes from the site; and could not produce documentation of materials movement onto or away from the VIM Site.[29]" Violations including open dumping were also reported at Defendants' other facilities.

On March 3 and 4, 2009 IDEM conducted an inspection of the VIM site and reported that "VIM is conducting unpermitted processing (grinding) of regulated solid wastes (manufactured wood wastes) at this site. The company and owner were notified that they would need to acquire a solid waste processing permit from IDEM to legally grind the regulated wastes for animal bedding product. VIM was notified of this in December 2008, but has failed to apply for and obtain the necessary permit(s) for processing regulated solid wastes at this site.[30]" While at the

[27] **Plaintiffs' Exhibit O:** IDEM letter of Bruce Palin to Ken Will, "Clarification of Status of Operations" (Dec. 17, 2008).
[28] **Plaintiffs' Exhibit P:** Violation-Referral to Enforcement Letter (Feb. 12, 2009).
[29] *Id.*
[30] **Plaintiffs' Exhibit Q:** IDEM Violation-Referral to Enforcement Letter (Mar. 13, 2009).

VIM site, the IDEM inspector reported experiencing a severe headache and burning sensations in his eyes, nose and throat that lasted about forty-eight (48) hours before dissipating.[31]

On April 15 and 16, 2009, IDEM reported that: "Defendants were continuing to place ground "C waste" on top of the Berm; Stormwater was draining through wood wastes and the ground into ground water as evidenced by the "severe discoloration" of stormwater trapped between the berm and "C waste" pile; Defendants had pushed the "demonstration pile" created in June 2008 into the "screened top soil" product pile; Defendants continued to "open dump" both "B" and "C" wastes; Defendants had incorporated waste materials into the "screened top soil" product; and "Screened Top Soil" product was being sold without a Marketing and Distribution permit.[32]"

On May 5, 2009, representatives of the U.S. Environmental Protection Agency ("EPA") and IDEM visited the VIM site and found evidence of open burning and noted that air in the neighborhood directly downwind of the VIM site smelled of acrid smoke.[33] On May 8, 2009, EPA issued a Notice of Violation ("NOV") to Defendants VIM and KC pursuant to the Clean Air Act ("CAA") and Indiana's State Implementation Plan ("SIP") provisions for the open burning violations found on May 5, 2009 at the VIM site.[34]

On June 2 and 3, 2009, IDEM inspected Defendants' sites in Goshen, Elkhart and the recently established site in Warsaw, Indiana ("Warsaw site"). On inspection of the Elkhart site, IDEM found that Defendants: co-mingled mixed "A" hardwoods with a "substantial amount" of regulated "B" wood wastes for grinding; continued open dumping of regulated wastes; were

[31] **Plaintiffs' Exhibit R:** Email of Rick Roudebush, IDEM to Jerri-Ann Garl,(Mar. 20, 2009).
[32] **Plaintiffs' Exhibit S:** IDEM Violation-Referral to Enforcement Letter (May 8, 2009) with attached Report of Open Dump Inspection (4/15-4/16/09) and photographs.
[33] **Plaintiffs' Exhibit T:** U.S. EPA Notice of Violation, EPA-5-09-IN-12 (May 8, 2009).
[34] *Id.*

processing regulated wastes without a solid waste processing permit; had failed to file a Notice of Intent (NOI) for a Rule 6 storm water permit; and failed to obtain a Marketing and Distribution permit for the sale of materials made with regulated industrial wastes to be land applied ("screened top soil").[35] On inspection of the Warsaw site, IDEM found that Defendants, VIM and Kenneth Will, were open dumping and processing regulated wastes without proper permits and were storing materials made with regulated industrial wastes ("screened top soil") that had been transported from Defendants' Elkhart location - the VIM site - to be sold from the Warsaw site without a Marketing and Distribution permit.[36]

On June 22, 2009, EPA and Defendant, Kenneth Will, on behalf of Defendants VIM and KC Industries, entered into an Administrative Consent Order ("ACO") to resolve EPA's NOV. The ACO requires Defendants to remove "all mixed construction and demolition debris greater than four (4) inches in diameter, contained in the 'C piles' . . . by December 31, 2009." The ACO allows "[s]maller materials, i.e. less than four (4) inches in diameter, [to] remain on site for integration into marketable material authorized by IDEM.[37]" Since that time, EPA and IDEM staff have been at the VIM site on a weekly basis to ensure Defendants' compliance with the ACO. As a result of the removal process, Plaintiffs have been exposed to significant and uncontrolled smoke emissions containing Volatile Organic Compounds ("VOCs") including Formaldehyde, a hazardous air pollutant, Particulate Matter ("PM") and other harmful emissions.[38]

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[35] **Plaintiffs' Exhibit U:** IDEM Violation-Referral to Enforcement Letter (June 26, 2009) with attached Report of Open Dump Inspection (6/2/09) and photographs.
[36] *Id.*
[37] **Plaintiffs' Exhibit V:** U.S EPA Administrative Consent Order (June 22, 2009).
[38] **Plaintiffs' Exhibit W:** Affidavit of Mark L. Chernaik, Ph.D (Dec. 23, 2009).

On August 11 and 12, 2009, IDEM again inspected the VIM site and found Defendants continued to: co-mingle mixed "A" hardwoods with regulated "B" wood wastes for grinding; open dump regulated wastes; process regulated wastes without a solid waste processing permit; and sell materials made with regulated industrial wastes to be land applied ("screened top soil") without a Marketing and Distribution permit.[39]

On September 30, 2009, IDEM inspected the Defendants' Warsaw site and noted that Defendants continued to open dump regulated wastes, including wastes from the Elkhart site, process regulated wastes without obtaining a solid waste processing permit, failed to obtain a legitimate use approval for sale of animal bedding made with regulated waste wood, failed to file an Notice of Intent for stormwater control, and failed to obtain Clean Air Act permits for the construction and operation of grinding machinery. Although "six (6), fifty (50) cubic yard roll off boxes" of regulated wood wastes were open dumped at the Warsaw site while IDEM inspectors were present, Defendants were not grinding that day due to "numerous complaints of fugitive dusts" the owner of the Warsaw property had received from adjacent property owners.[40]

Defendant, Kenneth Will, disclosed to IDEM on October 7, 2009 that Defendants are now collecting and hauling regulated waste woods to a processing (grinding) operation in Michigan to evade IDEM directives. Defendant Kenneth Will informed IDEM that "he planned to abandon the open dump at [the Warsaw site] until the Elkhart building was operational and he had obtained all the required permits from IDEM necessary to legally process (grind) regulated waste woods at the VIM Recycling, Elkhart location.[41]"

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[39] **Plaintiffs' Exhibit X:** IDEM Violation-Referral to Enforcement Letter (Aug. 27, 2009) with attached Report of Open Dump Inspection and photos.
[40] **Plaintiffs' Exhibit Y:** IDEM Summary Letter/Referral to Enforcement Letter (Oct. 19, 2009) with Report of Open Dump Inspection (9/30/09) and photographs.
[41] *Id.*

On December 8, 2009 through December 12, 2009 Defendants open dumped at least 420 tons of B waste at the VIM site while IDEM and EPA personnel were present.[42] On December 8th, the IDEM inspector witnessed Defendants open dump approximately three hundred (300) cubic yards of "B" waste at the VIM site in less than one (1) hour.[43] Subsequently, USEPA witnessed Defendants open dumping "B" waste and pushing the waste on top of the existing pile increasing its height approximately five (5) feet.[44] According to interviews with the Defendants' truck drivers, Defendant Ken Will, directed the drivers to open dump the regulated waste at the VIM site despite the fact that Mr. Will knew it was illegal.[45]

II. REGULATORY AND PROCEDURAL BACKGROUND

RCRA was enacted, in part, based on the Congressional finding that "disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment." 42 U.S.C § 6901(b)(2). Congress recognized that "open dumping *is particularly harmful* to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land." 42 U.S.C. § 6901(b)(4) (emphasis added). Under RCRA, states are required to develop and implement solid waste management plans that "prohibit the establishment of new open dumps." 42 U.S.C. § 6943(a)(2). Moreover, RCRA expressly prohibits "any solid waste management practice or disposal of solid waste . . . which constitutes the open dumping of solid waste." 42 U.S.C. § 6945(a).

Indiana regulations promulgated pursuant to RCRA prohibit "the storage, containment, processing, or disposal of solid waste in a manner which creates a threat to human health or the

[42] *See* **Plaintiffs' Exhibit C,** supra; *see also* **Plaintiffs' Exhibit Z:** Email of Paul Reusch, EPA of December 16, 2009 to Plaintiffs' Counsel, Kim Ferraro, with attached photographs.
[43] **Plaintiffs' Exhibits C and Z.**
[44] *Id.*
[45] **Plaintiffs' Exhibit C**.

environment, including the creating of a fire hazard, vector attraction, air or water pollution, or other contamination." 329 IAC 10-4-2. In addition, Indiana regulations proscribe disposal of solid waste at an "open dump" defined as "the consolidation of solid waste from one (1) or more sources or the disposal of solid waste at a single disposal site that: (1) does not fulfill the requirements of a sanitary landfill or other land disposal method as prescribed by law or regulations; and (2) is established and maintained (A) without cover; and (B) without regard to the possibilities of contamination of surface or subsurface water resources." 329 IAC 10-4-3; Ind. Code § 13-11-2-14; Ind. Code § 13-11-2-147. Although temporary "storage" or "accumulation" of solid waste may be allowed, "disposal" is presumed if the "storage" or "accumulation" of solid waste is longer than six (6) months. 329 IAC 10-2-181.

Given RCRA's express prohibition on open dumping, RCRA authorizes citizens to commence a civil action "against any person . . . alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to [RCRA]" or "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal or any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(A) and (a)(1)(B). "The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition or order" and/or "restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of solid or hazardous waste" which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(2).

Since August of 2005, IDEM has determined that the VIM site is an "open dump" and that Defendants' solid waste practices constitute "open dumping." IDEM's numerous inspection reports and violation notices over the last nine(9) years, and Defendants' recent intentional dumping of "B" waste at the site in front of IDEM and EPA officials, provide clear evidence that Defendants have, for years, intentionally violated and continue to knowingly, intentionally and willfully violate RCRA's open dumping prohibition and Indiana's solid waste management laws enacted to protect public health and the environment, including that of Plaintiffs. Public records from EPA, IDEM and other state and local agencies over the last nine years contain overwhelming evidence of Plaintiffs' continuous complaints of fugitive dust, smoke, horrible odors, fires, and other nuisance conditions created by Defendants' solid waste activities at the VIM site. These harmful conditions and Defendants' blatant disregard for the law must be abated to prevent further actual and potential damage to Plaintiffs' environment, health, and safety during the pendancy of this lawsuit through an order of the Court for preliminary injunctive relief.

III. STANDARD FOR PRELIMINARY INJUNCTION

To obtain a preliminary injunction, Plaintiffs must demonstrate that they are reasonably likely to succeed on the merits; the threat of irreparable harm outweighs any harm the non-moving party will suffer if the injunction is granted; Plaintiffs have no adequate remedy at law; and the injunction will not harm the public interest. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *See also United States v. Midwest Solvent Recovery,* 484 F. Supp. 138, 144 (N.D. Ind. 1980). Once Plaintiffs meet this threshold burden, this Court must weigh the factors against one another in a sliding scale analysis, meaning the Court must exercise its

discretion to determine whether the balance of harms weighs in favor of Plaintiffs or whether the Defendants or the public interest will be sufficiently harmed such that the injunction should be denied. *Christian Legal Soc'y,* 453 F.3d at 859.

Plaintiffs satisfy each of the elements for injunctive relief for the reasons discussed below:

A. Plaintiffs are being irreparably harmed and have no adequate remedy at law

"[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v Village of Gambell*, 480 U.S. 531, 545 (1987). A primary purpose of RCRA is to eliminate the practice of open dumping which Congress determined is "particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land." 42 U.S.C. § 6901(b). Thus, Defendants' continued, ongoing violations of RCRA's open dumping prohibition, alone, presents strong evidence of irreparable harm.

Notably, Indiana courts recognize that "where protection of the public welfare is involved, injunctive relief is allowed without proof or findings that an adequate remedy at law exists. *National Salvage & Service Corp. v. Commissioner of Indiana Dept. of Environmental Management*, 571 N.E.2d 548, 559 (Ind.App. 1991) (relying on *State ex rel Indiana State Board of Dental Examiners v. Boston System Dentists,* 215 Ind. 485, 19 N.E.2d 949 (1939)). Finding injunctive relief proper in a case with similar facts to the case at bar, the Indiana Appellate Court in *National Salvage* explained:

> A facility without a [solid waste processing] permit poses an imminent and substantial endangerment to the health and welfare of the people in the area. Failure by such a facility to obtain a permit, therefore, is a situation in which no adequate remedy at law exists. Even if IC 13-7-12-2 is not interpreted as authorizing an injunction, in this case injunctive relief would be allowed without proof or findings that no adequate remedy at law exists *because the protection of the public welfare is involved.*

571 N.E.2d at 558 (emphasis added).

Indiana courts also recognize the "*per se* rule" which is well articulated by the Indiana Appellate Court in *Department of Financial Institutions v. Mega Net Services*:

> It is well settled [in Indiana] that where the action to be enjoined is unlawful, the unlawful act constitutes *per se 'irreparable harm'* for purposes of the preliminary injunction analysis. When the *per se* rule is invoked, the trial court has determined that the defendant's actions have *violated a statute and, thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm* or whether the plaintiff will suffer greater injury than the defendant.

833 N.E.2d 477, 485 (Ind. App. 2005) (emphasis added); *see also Sadler v. State ex rel. Sanders,* 811 N.E.2d 936, 953 (Ind.App.,2004) (noting that "when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor").

Defendants' conduct constitutes not only irreparable harm *per se*, but irreparable harm in fact. In the instant case, IDEM determined more than four years ago that the massive outdoor waste piles at the VIM site are "a threat to human health or the environment, including the creating of a fire hazard, vector attraction, air or water pollution, or other contamination," and constitute an "open dump.[46]" There is overwhelming evidence to demonstrate that Plaintiffs have and will continue to suffer irreparable harm from exposure to noxious odors, air pollution, ground water contamination, fire and safety hazards from VIM's illicit solid waste activities.

[46] *See* **Plaintiffs' Exhibit B.**

Specifically public records obtained from IDEM are replete with public comments, letters, emails, formal complaints, photographs and other documents submitted by various Plaintiffs over the last nine years evidencing the harm VIM's operations have caused. For example, eighteen (18) employees of Plaintiff, Summit Seating, Inc., prepared a joint letter to IDEM on November 20, 2008 regarding "the polluted air produced by VIM.[47]" Specifically, they complained:

> Most days the air has a very offensive stench, making it very hard to breath. Many people complain of headaches, sore throats, and eye irritation. We have had to evacuate our building and lose work time due to two major fires [at the VIM site]. In addition to two major fires, many smoldering fires have taken place [at the VIM site] over the years causing additional air pollution. We are extremely concerned about the effect of this polluted air on our long-term health.
>
> We would like to invite any and all of the decision makers to spend a few hours a day, for a week, at our company and experience what we all have to endure.[48]

Plaintiff Debra L. Brown wrote:

> Our property lies just west of V.I.M. Recycling . . . Our first issues with the company began with fugitive dust over everything. On are [sic] lawn tables, lawn chairs, birdbaths, doghouses, lawn decorations. It is on anything your mind can imagine outside someone's home. . . . I drove over to V.I.M. I met with Ken Will and showed him my car . Before I left Ken Will agreed that the wood dust came from his business and gave me a check to rewash my car. . . . The smell that emits from V.I.M. RECYCLING is horrendous. When the company is moving old piles the smell reminds you of raw sewage or rotten eggs and it goes on for days. I will never forget the morning my daughter came running into the house when she should have been waiting for the school bus and was vomiting from the smell emitting from V.I.M. RECYCLING. Our neighborhood has many days we are forced to stay indoors because of the smell....that should happen to no-one! On those days we cannot open our windows, enjoy our swimming pools, hang our clothes on the line, have company over or let our children play outdoors. WE ARE IMPRISONED!!![49]

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[47] **Plaintiffs' Exhibit AA:** Letter of Summit Seating, Inc. Employees (Nov. 20, 2008).
[48] *Id.*
[49] **Plaintiffs' Exhibit BB:** Letter of Debra L. Brown.

A statement from Plaintiff, Karen Troeger reads:

> Day after day I am able to smell the stench coming from VIM. It's not just a little smell. It's very strong and acrid, even from a mile away. After my full time job, I love to work in my yard and garden or just enjoy relaxing outdoors on my patio. However, many times I have not been able to do these things because of the smell, which is often so bad that I cannot even open the doors or windows of the house. This is not counting the poor air quality, stench and smoke from the two times the VIM property or grounds were on fire.[50]

Notably, Rick Roudebush, Technical Environmental Specialist with IDEM's Office of Land Quality ("OLQ") described his concerns with the VIM site to USEPA as follows:

> *[T]his site may and probably does pose an imminent and substantial threat to the health and well being of the citizens who live in close proximity to the VIM Recycling Elkhart facility.* Although IDEM does not have any direct data to show this site as such, the waste piles on the property are continually emitting contaminates to the air (through smoke, steam and particulates), by the facility continually processing (i.e. turning piles) of what we have labeled "C" wastes. "C" wastes are "B" wood waste that have degraded to the point where the engineered woods have released the binding agents and started to literally fall apart. The "C" waste pile is also partially comprised of construction and demolition wastes from Hurricane Katrina. This issue is made worse because the "C" waste pile is still smoldering from an explosion in mid 2007 that set the "C" waste pile on fire.
>
> . . .
>
> I have received multiple citizen email and phone complaints each week since last summer, complaining of smoke, particulate matter and extreme noxious odors being emitted into their neighborhood from the continual processing of the waste materials. It appears most all of the citizens in this area are experiencing the same symptoms, runny eyes and noses and burning sensations in their eyes, noses and throats. They tell me they will be awakened during the middle of the night by these symptoms and the noise of heavy equipment processing materials and waste during the night and early morning hours (i.e. 2 AM - 3 AM). *I myself have experienced some of the same symptoms after I collected samples of the wastes* during my last inspection on 3-3 and 3-4-09.[51]

[50] **Plaintiffs' Exhibit CC:** Letter of Karen M. Troeger, "Public Meeting with IDEM Staff Concerning Community vs. Renewal of the Title V Air Permit to VIM Recycling (Nov. 20, 2008).
[51] **Plaintiffs' Exhibit R.**

The attached IDEM inspection reports, photographs, and letter from Elkhart County attorney, Gordon Lord, are but a few, additional examples from the substantial body of evidence in this case demonstrating the irreparable harm VIM's operations have inflicted and will continue to inflict on Plaintiffs' persons and properties if not enjoined by this Court.

Based on his review of this evidence, Plaintiffs' expert, Dr. Mark Chernaik, has concluded that allowing further dumping and processing of solid waste at the VIM site will cause irreparable harm to Plaintiffs in several ways: 1) the processing and grinding of B pile waste releases air pollutant emissions in quantities that are harmful to human health; 2) the open dumping of B pile waste onto bare ground allows the infiltration into groundwater and surface water of harmful quantities of toxic constituents including cadmium, arsenic and lead; 3) accumulated liquids associated with the B pile waste contain high levels of sulfides, which when left standing in low-lying areas will release hydrogen sulfide gas, a dangerous gas with a noxious odor (rotten egg smell); and 4) the decay of B pile waste into C pile waste entails the risk of further fires and smoldering waste piles that have impacted the health of the surrounding community for so many years and has been the subject of intensive remedial action in recent months.[52]

In sum, there is sufficient evidence of irreparable harm that has been and continues to be imposed on Plaintiffs that must be abated by this Court pending the final resolution of this matter.

B. Plaintiffs are substantially likely to succeed on the merits

There are three fundamental issues that will dictate whether Plaintiffs prevail in their RCRA citizen suit against Defendants: 1) whether this Court has subject matter jurisdiction over

[52] **Plaintiffs' Exhibit W**.

Plaintiffs' claims; 2) whether Plaintiffs' have standing; and 3) whether Defendants' solid waste activities violate RCRA and/or pose an imminent and substantial endangerment to health or environment. The evidence conclusively supports Plaintiffs on all three issues.

1. This Court has subject matter jurisdiction over Plaintiffs' claims

28 U.S.C. § 1331 provides federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Counts I and II of Plaintiffs' Verified Complaint seek relief as allowed under the federal RCRA's citizen suit provision. Namely, Count I seeks to enforce RCRA's open dumping prohibition and solid waste regulations promulgated under the Act. Count II seeks to restrain Defendants' solid waste activities which may present an imminent and substantial endangerment to health or the environment.

RCRA's citizen suit provision expressly directs that that such actions "*shall* be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur" and the "district court *shall* have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." 42 U.S.C. § 6972(a)(2) (emphasis added). Thus, under 28 U.S.C. § 1331, this Court clearly has original jurisdiction over Plaintiffs' federal RCRA claims. Under 28 U.S.C. § 1367, this Court also has supplemental jurisdiction over Plaintiffs' state law claims, which are so related to the claims in Counts I and II that they form part of the same case or controversy.

Plaintiffs have also strictly complied with the sixty (60) and ninety (90) day Notice requirements of 42 U.S.C. § 6972 which are mandatory preconditions to commencing a RCRA citizen suit. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). Specifically, On April 16, 2009,

Plaintiffs served a Notice of Intent to File Suit as required by 42 U.S.C. § 6972(b) and 40 CFR § 254.2(a)(1) on all Defendants by certified mail, return receipt requested.[53] Copies of the Notice were mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for Region V, the Attorney General of the United States, the Commissioner of the Indiana Department of Environmental Management, the Attorney General of the State of Indiana, and the Regional Director of IDEM's Northern Regional Office. Plaintiffs' lawsuit was filed with this Court on October 27, 2009, more than five months after Plaintiffs' served their Notice of Intent to Sue.

Finally, EPA's Administrative Consent Order ("ACO") of June 22, 2009 and IDEM's enforcement action filed on October 3, 2008 do not preclude Plaintiffs' RCRA claims under 42 U.S.C. § 6972(b)(1)(B), (b)(2)(B) or (b)(2)(C).[54] Those provisions would preclude Plaintiffs' RCRA claims if there is "a substantial identity between the issues in controversy." *Sierra Club, Hawaii Chapter v. City and County of Honolulu*, 415 F. Supp. 2d 1119, 1126 (D. Hawaii 2005) (citing *Alaska Sport Fishing Assoc. v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994)). However, the issues in controversy raised by Plaintiffs' citizen suit, are separate and distinct from those raised by IDEM's enforcement action and/or resolved by EPA's ACO.

Specifically, EPA's ACO is <u>not</u> a civil action brought under 42 U.S.C. § 6973, 42 U.S.C. § 9606 or a CERCLA removal action under 42 U.S.C. § 9604. Rather, EPA's ACO resolves Defendants' Clean Air Act violations discovered by EPA on May 5, 2009 involving open burning

[53] A copy of said Notice of Intent to Sue is attached to Plaintiffs' Verified Complaint.
[54] Sections (b)(1)(B), (b)(2)(B) and (b)(2)(C) preclude RCRA citizen suits where the Administrator or State has "commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation condition, requirement, prohibition or order;" "has commenced and is diligently prosecuting an action under section 6973 . . . or . . . [42 U.S.C. § 9606]" to "restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment;" or is engaged in "a removal action under . . . [42 U.S.C. § 9604]."

of the "C" waste pile. The ACO does not resolve Defendants' years of open burning violations that occurred prior to May 5, 2009, and does not resolve Defendants' open burning violations, involving the "A" and "B" waste piles and berms made with solid waste. The ACO does not require Defendants to remove all solid wastes at the VIM site and, does not address Defendants' past or ongoing RCRA violations at all.

Similarly, IDEM's enforcement action seeks only to enforce the AO of January 16, 2007 which required Defendants to remove or properly dispose of "C" waste that existed at the time of entry of the AO, by September 30, 2008. IDEM's enforcement action does not address "A" or "B" wastes accumulated at the site, or "B" waste that turned to "C" waste after entry of the AO. Moreover, the AO does not require removal of "A" or "B" wastes, "B" wastes that turned to "C" wastes after entry of the AO, or berms made with solid wastes.

The very purpose of the RCRA citizen suit provision is to provide citizens with a means for addressing "a threat that continues to exist and produce adverse consequences." *See Truck Components Inc. v. Beatrice Co.*, NO. 94 C 3228, 1994 WL 520939, at *6 (N.D. Ill. Sept. 21, 1994). Improper disposal constitutes "a continuous RCRA violation. . . as long as no proper disposal procedures are put into effect or as long as the waste has not been cleaned up and the environmental effects remain remediable." *Truck Components Inc.*, 1994 WL 520939, at *6 (citing several cases).

Defendants continue to improperly dispose, i.e. open dump "B" waste at the VIM site. In addition, the Defendants continue to process solid waste without a solid waste processing permit. Defendants continue to operate an open dump with several tons of "B" and "C" wastes that are not subject to removal under EPA's ACO or IDEM's enforcement action. Plaintiffs' citizen suit

seeks to remedy these ongoing RCRA violations and restrain Defendants' solid waste activities that pose an imminent and substantial endangerment to human health and environment - violations and activities which are not remedied by EPA's ACO or IDEM's enforcement action. Accordingly, those administrative actions do not preclude the instant action. *See also Fishel v. Westinghouse Electric Corp*., 617 F. Supp. 1531, 1538 (M.D. Pa. 1985) (outstanding section 106 order, issued by the EPA under CERCLA was not a bar to Plaintiffs' citizen suit under RCRA because Plaintiffs were not challenging the scope of the remedial actions ordered by the EPA but, rather, sought only to add to those actions.)

2. Plaintiffs have standing

Generally, the standing analysis requires a showing that: 1) the plaintiff has suffered an "injury in fact" which is an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; 2) there is a causal connection between the injury and the conduct complained of, i.e., the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and 3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *See generally Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

Plaintiffs may establish injury in fact by proving that their properties have been contaminated, or that there is a *threat* of contamination. See, e.g., *Fishel,* 617 F.Supp at 1540 (residential property owners whose property was not contaminated but was within potential zone of impact defined by EPA held to have standing to sue). In addition, standing can be established by demonstrating that the plaintiffs' health, economic, recreational, or aesthetic interests have

been or *may be* adversely affected (regardless of whether a plaintiff has any ownership interest in the property that is endangered). *See No Damaging or Unsightly Municipal Pollution Inc. v. King County,* 24 Envt Rep Cas 1929 (WD Wash 1986). *See also O'Leary v. Moyer's Landfill Inc.,* 523 F.Supp 642 (ED Pa 1981) (citizens held to have standing under RCRA to challenge landfill's release of contaminated leachate, even though there was insufficient evidence of actual harm to support liability).

All Plaintiffs named in this lawsuit own property, reside and/or work in close proximity and/or directly adjacent to the VIM site. An elementary school that Plaintiffs' children attend is less than one mile away. In addition to their RCRA citizen suit, Plaintiffs are seeking monetary damages under state tort law for sustained injuries to their health and properties from Defendants' operations at the VIM site. They are also seeking to prevent further harm to their persons and properties from continued air, land and water pollution and fire hazards generated from Defendants' solid waste activities at the VIM site. Thus, Plaintiffs clearly have direct and present concerns, that are neither general nor unreasonable, that constitute a legally cognizable injury as recognized by section 6972(a)(1)(B). *See Laidlaw,* 528 U.S. at 181-184; s*ee also Friends of the Earth v. Gaston Copper Recycling,* 204 F.3d 149, 160 (4th Cir. 2000). ("The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements . . . threats or increased risk thus constitutes cognizable harm.")

Traceability and redressability are likewise easily demonstrated. Plaintiffs' legally cognizable injuries relate directly to Defendants' solid waste activities at the VIM site, and the "fairly traceable" requirement does not mean that plaintiffs must show to a scientific certainty that defendants' actions, and defendants' actions alone, caused the precise harm suffered by

Plaintiffs. *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.,* 913 F.2d 64, 72 (3d. Cir. 1990). "The fairly traceable requirement is not equivalent to a requirement of tort causation." *Id.* Finally, injunctive relief that prevents Defendants from processing solid waste and disposing any additional solid waste, including the open dumping of B grade waste onto the ground at the VIM site, will end the endangerment those activities pose to Plaintiffs health and environment.[55] As there is a connection between Plaintiffs' injuries and Defendants' solid waste activities, and a substantial likelihood that injunctive relief will remedy those injuries, plaintiffs clearly have standing.

3. Defendants' solid waste activities violate RCRA

The numerous inspection reports, violation notices and letters of referral to enforcement from IDEM citing Defendants for open dumping, and processing regulated solid waste without proper permits as required by Indiana's solid waste management laws provide overwhelming evidence that Defendants' solid waste activities at the VIM site violate RCRA.[56] The recent photographs taken by IDEM of a semi-truck actively dumping "B" waste at the site provide additional, conclusive evidence that Defendants' are violating RCRA's open dumping prohibition with absolute disregard for the law.

4. Defendants' solid waste activities pose an imminent and substantial endangerment to Plaintiffs' health and environment

Section 6972(a)(1)(B) is different from most citizen suit provisions including section 6972(a)(1)(A). *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1014-1015 (11th Cir. 2004). While most such provisions permit private enforcement of established environmental

[55] **Plaintiffs' Exhibit W.**
[56] Reference is made to IDEM inspection reports, violation notices and letters of referral to enforcement attached hereto as Exhibits.

standards, the right to relief under section 6972(a)(1)(B) is not predicated on violation of the substantive standards of RCRA. To the contrary, the right to relief attaches notwithstanding any other provision of RCRA when the "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a); *See United States v. Bliss,* 667 F.Supp. 1298 (ED Mo 1987). Also, unlike other citizen suit provisions, section 6972(a)(1)(B), applies retroactively to past solid waste violations or activities, so long as those violations or activities are a present threat to health or the environment. *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 485-86 (1996).

To prevail on a claim under section 6972(a)(1)(B), plaintiffs must prove: "(1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment." *Cox v. City of Dallas,* 256 F.3d 281, 292 (5th Cir. 2001). As discussed extensively above, the defendants have processed and disposed of solid waste at the VIM site for years, and, therefore, they contributed, or were contributing, to the handling, storage, treatment, transportation, or disposal of solid waste. Thus, the first two elements are met.

As to the final element of proof, plaintiffs need only demonstrate that the solid waste disposed of or processed "*may* present" an imminent and substantial threat. 42 U.S.C. § 6972(a)

(1)(B); *Cox,* 256 F.3d at 299 (emphasis added). Similarly, the term "endangerment" means a threatened or potential harm, and does not require proof of actual harm. *See Meghrig,* 516 U.S. at 486 (noting that "there must be a threat which is present now, although the impact of the threat may not be felt until later"). The endangerment must also be "imminent" which, combined with the word "may," require plaintiffs to show that there is a *potential* for an imminent threat of a serious harm. *Parker,* 386 F.3d at 1015; *See also United States v. Price,* 688 F.2d 204, 213-14 (3d Cir. 1982) (noting that § 6972(a)(1)(B) contains "expansive language" that confers "upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes").

As discussed previously, in Indiana, a solid waste processing "facility without a solid waste processing permit" is deemed, as a matter of law, to pose "an imminent and substantial endangerment to the health and welfare of the people in the area. *National Salvage,* 571 N.E.2d at 558 (emphasis added). Nevertheless, there is considerable evidence in this case demonstrating that Defendants' past and present solid waste activities at the VIM site have and continue to pose an imminent and substantial endangerment to Plaintiffs and their environment.

For example, demonstrating the long standing history of community complaints about Defendants' solid waste operations, attorney for the Elkhart County Solid Waste Management District Board wrote to Defendant Ken Will in 2004:

> The District Board has received numerous complaints about both your [Goshen site and Elkhart site]. The board has been advised by the Elkhart County Planning Department that it too has received citizen and neighbor complaints about your sites, particularly with regard to the rather newly created Elkhart operation, and its ever growing piles of outside storage and perpetual creation of dust and film negatively impact[ing] property owners in a wide area near [the] site.[57]

[57] **Plaintiffs' Exhibit E.**

Similarly, following the catastrophic fire in June 2007, IDEM noted that "VIM has attracted neighborhood complaints of odor, noise, and fugitive dust for a number of years.[58]" Identifying problems concerning the various solid waste piles at the site, IDEM personnel noted:

> The 'B' material . . . is a concern due to the size of the pile and the potential storage time in excess of 6 months.
>
> The solid waste berm at the VIM site is unstable and will need to be tested for engineering and environmental suitability.
>
> The 'C' material is deemed immediately harmful due to the ongoing fire hazards and presence of 'hot spots' [59]

More recently, IDEM's OLQ compliance inspector, Rick Roudebush, who has performed countless inspections of the VIM site reported that Defendants' open dumping and processing of solid wastes "may and probably does pose an imminent and substantial threat to the health and well being of the citizens who live in close proximity to the VIM Recycling Elkhart facility.[60]" In support of his opinion, Mr. Roudebush noted that "the waste piles . . . are continually emitting contaminates to the air . . . [from] processing (i.e. turning piles) of what [IDEM has] labeled 'C' wastes [which are] 'B' wood waste that have degraded to the point where the engineered woods have released the binding agents and started to literally fall apart.[61]" With respect to ground water contamination, Mr. Roudebush noted that:

> [T]he 'C' wastes have degraded to where the chemicals in the binders of the different types of wood have probably also released contaminates to the ground and groundwater. The soil types at the site are very sandy in nature, as it is throughout the entire region in northern Indiana.

As to the berms at the site, Mr. Roudebush reported the following concerns:

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[58] **Plaintiffs' Exhibit J**.
[59] **Plaintiffs' Exhibit K.**
[60] **Plaintiffs' Exhibit R.**
[61] *Id.; See also* **Plaintiffs' Exhibit S** (IDEM reporting that "water apparently drains through wood wastes and ground into ground water. Note severe discoloration of the stormwater in foreground.")

> [T]he berm is pretty much shot and about ready to collapse. . . We walked the entire berm and there were many areas where cracks or fissures had occurred in the berm. In fact, a slight bit of smoke could be seen in one of the cracks along the north wall of the berm. I do not know if the berm is smoldering from the fire, or internal combustion. Either way, it appears the berm has some subsurface smoldering, at least on the west side.

Consistent with IDEM findings, Dr. Mark Chernaik, a biochemist and environmental toxicologist who has reviewed relevant evidence in this case, determined that Defendants' past and continued dumping and processing of solid wastes at the VIM site pose significant health, fire and safety threats to the surrounding community including: the release of particulate matter, hydrogen sulfide gas, and volatile organic compounds including formaldehyde and acrolein, in quantities that are harmful to human health; the infiltration into groundwater and surface water of harmful quantities of toxic constituents including cadmium, arsenic, lead and sulfides; and the substantial risk of further catastrophic fires from internal and spontaneous combustion of smoldering waste piles as B waste decays into C waste.[62]

Based on this evidence alone, the potential health, fire and safety risks to Plaintiffs, i.e. the imminent and substantial endangerment to human health and environment, from Defendants' processing and disposal of solid wastes at the VIM site is clear.

C. Defendants will not be harmed by injunctive relief

Defendants will be hard pressed to argue that they will be harmed by an injunction that prevents them from engaging in illegal activities which they never had the right to engage in as an initial matter. An injunction will not prevent Defendants from engaging in some activity that they have a colorable or good faith basis to engage in because RCRA and its regulations expressly prohibit Defendants from open dumping or processing solid waste without a solid

[62] **Plaintiffs' Exhibit W.**

waste processing permit. In fact, the Court's equitable power to issue injunctive relief would be put in serious jeopardy if Defendants were allowed to avoid injunctive proscriptions by claiming that complying with law poses an undue hardship.

By contrast, if an injunction is not issued to stop Defendants' illegal solid waste activities, Plaintiffs will continue to suffer from the constant odors, fugitive dust, air pollution and threat of future fires posed by Defendants' operations. Any burden on Defendants is self-inflicted and cannot outweigh the irreversible harm to Plaintiffs and the environment from Defendants' illegal open dumping and unpermitted processing of harmful wastes at the VIM site.

D. An injunction will serve the public interest

Enjoining Defendants' illegal solid waste activities will benefit the public interest because Defendants will be prevented from their continued violation of RCRA mandates that were enacted expressly to protect the public interest. In addition, such relief will establish legal precedence that will prevent Defendants and similarly situated entities from engaging in such illegal activities in the future. Indeed, the very purpose and operation of RCRA's open dumping prohibition and state regulations requiring solid waste processors to obtain solid waste processing permits would be rendered meaningless if entities could carry on like Defendants in express disregard for the protections these provisions afford the public. Moreover, whatever "benefit" Defendants' operations purportedly would provide the public cannot justify their blatant disregard for RCRA and Indiana's solid waste management laws.

Indeed, in October of last year, David Moss, General Manager of Allied Waste Services and member of the Elkhart County Solid Waste Management Advisory Committee, wrote to IDEM expressing his doubts about the public benefit of Defendants' operations:

> Ken Will has been allowed to run an above ground landfill for years.
>
> Primarily, the wood he has in those piles is not the good, clean hard woods that make good mulch. Instead, it is the trailer factory wood with laminates, fiberglass, glues, etc. that is not good for a lot of things. For me, as a hauler, I must either haul that grade wood to a recycler like Ken or to the landfill. Price wise for me, both charge about the same. However, Ken has trucks and hauls as well as recycles. Ken tends to charge less to haul and dispose of the wood than he would charge for me to haul it to him and dispose it. Obviously, I cannot compete as I have cost for both haul and disposal. An example, Coachman Industries for me was an hour of haul time for which I would like to get $100 plus 40 yards of disposal (at wood recycler) at $3/yard totaling $220/load. Ken took that account from me a few years back at less than $100/load (I think it was $85). I can't compete with that, look at my disposal alone. On the other hand, [Ken Will] has been allowed to take that money the customer paid him and use it to cover his haul expenses and to pile the wood on the ground. That is wrong. Now he proposes to grind it and build these huge berms around his place. What is going to happen with those berms if he ever goes under or moves?
> His business practices have destroyed pricing in that market for all of us. . . Those prices are artificial because he is never made to expend the cost associated with properly recycling all the wood he takes in. . . . He should not be allowed to bury the wood on his property (berms) like he got away with in Goshen, that is landfilling while calling it recycling. He should be held to a rigid time table to clean up the piles and not allowed to increase them further with any inbound product. When you do this, he will have to start charging a price that reflects the total cost to recycle the wood, just like the rest of us do.
>
> Ultimately, Ken is a salesman and a good one. He can give a wonderful presentation on all the great things he is doing and all his hard luck stories. At the end of the day, he diverts a lot of material but he NEVER makes his commitments and time lines. It is not fair to those of us who do the right thing to let him get away with anything less than the same. That may reduce Elkhart County's recycling numbers some, because we have counted that 100,000 yards of material on the ground as recycled when it isn't yet. . . I understand that Mitch Daniels wants his administration to be business friendly, but I and many others are businesses too and we need to be part of the thought process when you decide what to allow [Ken Will] to do.[63]

In sum, Defendants cannot claim that the public interest will be served by their continued violation of the very laws that are designed to protect the public interest.

[63] **Plaintiffs' Exhibit DD:** Letter of David B. Moss to IDEM (Oct. 15, 2008).

IV. THE COURT SHOULD IMPOSE A MODEST BOND REQUIREMENT

Plaintiffs are represented in this case on a *pro bono* basis by the Legal Environmental Aid Foundation of Indiana, Inc. (LEAF), a non-profit corporation. LEAF brought this citizen suit on Plaintiffs' behalf pursuant to Congress' express authorization for private citizens to serve the public interest by acting as private attorneys general. Under such circumstances, courts have held that onerous bond requirements (particularly against non-profits) would undermine the operation of congressional enactments like RCRA and contribute to under-enforcement of such enactments.

By way of example, courts - both federal and state - have held that while the amount of a bond is within the discretion of courts, the bond amount cannot be so high as to thwart citizen actions. *See, e.g. Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1126 (9th Cir. 2005); *see also Colorado Wild v. U.S. Forest Serv.,* 299 F.Supp. 2d 1184, 1191 (D.Colo. 2004); *Save the Prairie Soc. v. Greene Development Group, Inc.*, 789 N.E.3d 389, 390 (Ill.App. 1st Dist. 2003); *Sierra Club v. Norton,* 207 F.Supp. 2d 1342, 1343 (S.D. Ala. 2002); *Sothern Appalachian Biodiversity Project v. U.S. Forest Serv.,* 162 F.Supp. 2d 1365, 1367 (N.D. Ga. 2001).

Nominal bonds consequently are considered reasonable for public interest groups or citizens to allow effective and meaningful review and private enforcement under environmental legislation. Indeed, "special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute." *People of State of Cal. v. Tahoe Reg'l Planning Agency,* 766 F.3d 1319, 1325-26 (9th Cir. 1985).

A large bond requirement will pose an undue hardship on LEAF, as a non-profit corporation. Furthermore, the requirement of a large bond would be prohibitive for Plaintiffs

who are pursuing their right to enforce RCRA and would undermine the congressional intent of RCRA's citizen suit provision. This result would be particularly harmful here given Defendants' long, documented history of violating RCRA and state solid waste management laws. Therefore, Plaintiffs request that, in connection with the requested preliminary injunction, the Court waive the bond requirement or, alternatively, require only a nominal bond.

V. CONCLUSION

Unless enjoined by this Court pending resolution of this case, Defendants will continue to violate RCRA's open dumping prohibition and Indiana's solid waste management laws which will result in immediate and irreparable harm to the air, water, and land in and around the VIM site and to Plaintiffs' persons and properties. The law and evidence entitle Plaintiffs to prevail on the merits of their claims against Defendants. No harm will come to Defendants if the Court enjoins Defendants' illegal activities, and the public interest will be served by putting an end to Defendants' illegal solid waste activities. For all of the foregoing reasons, Plaintiffs Motion for a Preliminary Injunction should be granted.

Respectfully submitted,

/s/ Kim E. Ferraro

Kim E. Ferraro, Attorney No. 27102-64
Legal Environmental Aid Foundation of Indiana, Inc.
150 Lincolnway, Suite 3002
Valparaiso, Indiana 46383
219/464-0104

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of December, 2009, the foregoing and all exhibits referenced therein were filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

Sue A. Shadley
Amy E. Romig
Jonathan P. Emenhiser
PLEWS SHADLEY RACHER & BRAUN LLP
1346 N. Delaware Street
Indianapolis, IN 46202
Phone 317/637-0700
Fax: 317/637-0710

/s/ Kim E. Ferraro

Kim E. Ferraro